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Equitable Life & Casualty Insurance Company, a Utah Corporation v. Inland Printing Company, a Utah Corporation; William A. Mulvay; D. Keith Barnes; Wendell Barnes; Harold Gailey; H. J. Barnes; Charles W. Halford; Charles Taggart aka Charles W. Taggart : Appellants Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

EQUITABLE LIFE & CASUALTY INSUR-
ANCE COMPANY, a Utah Corporation,

Plaintiff and Appellant,

vs.

INLAND PRINTING COMPANY, a Utah
Corporation; WILLIAM A. MULVAY; D.
KEITH BARNES; WENDELL BARNES;
HAROLD GAILEY; H. J. BARNES;
CHARLES W. HALFORD; CHARLES TAG-
GART aka CHARLES W. TAGGART,

Defendants and Respondents.

Case No.
12255

APPELLANT'S BRIEF

NATURE OF THE CASE

Defendant Inland Printing Co. defaulted on the Note and Mortgages and plaintiff filed and served an action, also naming the other defendants as responsible directors, officers or agents, seeking a Judgment against all defendants, however, a Deficiency Judgment was entered only against Inland after the sale of the properties.

DISPOSITION BY TRIAL COURT

The above named defendants, except Inland, filed and served their Motions to Dismiss, alleging the Amended Complaints *failed to state a claim against said defendants upon which relief could be granted*; and the Motions to Dismiss were heard before Judge Henry Ruggeri, and granted; and Orders of Dismissal were executed and filed, Record 40, 46, 49, 54 and 58. Inland defaulted.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Trial Court's Orders of Dismissal, Record 40, 46, 49, 54 and 58, with the case and action remanded to the Trial Court with directions that the case go to trial on the issues of whether or not these defendants, as responsible directors, officers or agents, were reckless, careless or negligent in causing and bringing about Inland Printing Company's depleted, financial condition as alleged in the Amended Complaints; and if such is proved, Judgments be entered against these defendants jointly and severally and each of them.

STATEMENT OF FACTS

Inland Printing Company, a Utah Corporation, was organized under the laws of the State of Utah about 1916 and had its main offices in Kaysville, Utah. In 1961 Inland executed and delivered to plaintiff a First Mortgage Note in the amount of \$41,000.00, Record 6, and that as further security for the indebtedness Inland gave plaintiff a Real Estate Mortgage, Record 7, and Chattel Mortgages, Record 12, 14, 16, 17, 19, 20. Inland defaulted on its payments to plaintiff on the indebtedness. Since 1961 the other defendants were either responsible directors, officers or agents of Inland.

On one occasion Inland was disposed of in violation of the Articles of Incorporation, Record 26 and 33, and in violation of the Utah Bulk Sales Act, to defendant Taggart, Record 26 and 27. Defendant Taggart returned Inland to a majority of the defendants, who then in turn disposed of Inland to defendant Mulvay also in violation

of the Articles of Incorporation and Utah Bulk Sales Act. During this time Inland plunged into a hopeless, financial condition to the detriment and damage of the plaintiff. Inland became a total bankrupt and as a direct and proximate result, plaintiff has suffered damages due to the uncollectible Amended Deficiency Judgment, in the amount of \$12,840.48, from Inland.

Plaintiff filed and served its Amended Complaints praying judgment against all defendants. The Trial Court granted the defendants' Motions to Dismiss, except Inland which defaulted.

The mortgaged properties were sold by the Sheriff with a resulting Amended Deficiency Judgment being entered in favor of plaintiff and against Inland in the sum of \$12,840.48.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY GRANTED THE DEFENDANTS' MOTIONS TO DISMISS AND ERRONEOUSLY EXECUTED AND ENTERED ORDERS OF DISMISSAL.

The Orders of Dismissal have been treated by all parties as dismissals from this case and action with prejudice, Record 40, 46, 49, 54 and 58.

The Utah Rules of Civil Procedure, Rule 8 (a) (1) and Rule 12 (b) (6) and Rule 56 should be read together in this case. Rule 8 (a) (1) states that a pleading which sets

forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief"; and Rule 12 (b) (6) states among other things that a defense may at the option of the pleader, defendants herein, be made by motion "failure to state a claim upon which relief can be granted"; and that Rule 56 provides for a summary judgment which in effect has been granted to these defendants as they were totally and completely dissolved from and dismissed from this case and action.

In a recent Utah case in 1970, *Christensen vs. Lelis Automatic Transmission Service, Inc.*, 24 Utah 2nd 165, 467 P.2nd 605, the Trial Court dismissed the complaint on the grounds that it did not state a claim upon which relief could be granted and on appeal the Utah Supreme Court reversed and remanded for further proceedings, stating among other things,

"In *Blackham v. Snelgrove*, this court observed that under Rule 8(a), U.R.C.P., a complaint is required only to give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. A complaint does not fail to state a claim unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."

The Amended Complaints in this case give the defendants fair notice of the nature and basis or grounds of the plaintiff's claim that defendants, being either responsible directors, officers or agents of Inland, carelessly, negligently, recklessly and without due regard for the rights of the plaintiff brought about Inland Printing Company's finan-

cial plight and bankruptcy by passing Inland back and forth among defendants in violation of Inland's Articles of Incorporation, especially Article 3, Section 13, and in violating the Utah Bulk Sales Act, especially in that *notice* was not given to creditors, and that they also violated Article 10 of the Articles of Incorporation in that *notice* was not given to the stockholders, calling for a meeting for the purpose of transferring, selling or disposing of Inland first to Taggart and then to Mulvay; and that defendants disposed of or allowed to be disposed the stock, stock records, books and memorandums; and that these defendants violated their fiduciary capacities and authorities and caused plaintiff to be damaged; and these defendants failed in their fiduciary capacities which placed Inland in its bankrupt condition; all of which is alleged in the Amended Complaints, giving defendants fair notice of their wrongful activities and mismanagement with the plaintiff being entitled to Judgment against these defendants.

In another Utah case, *King Bros., Inc. vs. Utah Dry Kiln Co.*, 13 U.2nd 339, 374 P.2nd 254, the Trial Court dismissed the action and the plaintiff appealed and the Supreme Court remanded for further proceedings stating among other things,

"In the face of the motion to dismiss the complaint, the trial court and this court on review, are obliged to survey its allegations in the light most favorable to the plaintiff; and in a similar manner to indulge in its favor all reasonable inferences as to proof that may be adduced thereunder. From the standpoint of the administration of justice it is wise and

desirable to adhere to a policy of being reluctant to turn a party out of court without trial. It can justifiably be done only if the party could not in any event establish a right to recover. In view of those principles, there should be a trial and the taking of evidence" * * *

Plaintiff is entitled to go to trial against these defendants and try to recover judgment against these defendants jointly and severally and each of them for the amount of the present Amended Deficiency Judgment in the sum of \$12,840.48 because of the defendant's reckless, irresponsible, negligent mismanagement and inattendant to their fiduciary responsibilities. This case should be remanded to the Trial Court for trial between appellant and these defendants. The defendants' negligent mismanagement of Inland as directors, officers or agents caused Inland's financial situation to be and become bankrupt with assets dissipated before the foreclosure action, and as a direct and proximate result of the negligence of these defendants, plaintiff has suffered damages under the terms of the Note and Mortgages. These defendants constituted a majority of the Board of Directors, officers or responsible agents and being in control of Inland, relieved themselves of their fiduciary responsibilities.

In Federal practice the Federal Rule of Civil Procedure, Rule (8)(a) (2) provides only for a short and plain statement of the claim in the complaint showing that the pleader is entitled to relief. In Wright and Miller, Federal Practice and Procedure, Vol. 5 at page 108, the following is stated,

* * * "All that is necessary is that the claim for relief be stated with brevity, conciseness and clarity. This portion of Rule 8 indicates the objective of the rules to avoid technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved;" * * *

In the present case, the plaintiff has alleged in its Amended Complaints the nature of the negligent conduct by the defendants. The conduct as alleged in the Amended Complaints states that the defendants' acts of omission and commission wrongfully damaged plaintiff; and that plaintiff at all times materially relied upon and had the right to rely upon the defendants to exercise their responsibilities as fiduciaries of Inland.

In Baron and Holtzoff, Federal Practice and Procedure, Vol. 1 A, page 54, it is stated that the pleadings are liberally construed and "a complaint is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts which can be proved in support of its allegations." In this case, the defendants should not be dismissed from the case and the plaintiff is entitled to go to trial against these defendants to prove that these defendants by their negligent actions of omission and commission caused the financial plight of Inland, thereby damaging plaintiff, and that due to these defendants' negligent acts, plaintiff is entitled to a judgment against these defendants, jointly and severally and each of them, in the amount of the Amended Deficiency Judgment.

ment, on file in favor of plaintiff against Inland in the sum of \$12,840.48. The Amended Deficiency Judgment is totally uncollectable from Inland because of Inland's demise.

Plaintiff stood on its Amended Complaints but the Trial Court dismissed defendants from the case and action by the Orders of Dismissal. All parties treated the defendants' dismissal from the case and action with prejudice.

It is *horn book law* and common knowledge that the defendants' motions to dismiss *admitted* all the facts well pleaded, *Robner vs. U.P.R.R.*, 225 F.2nd 272, and there is a line of 10th Circuit cases to this effect.

Also in the case of *Wackerli vs. Martindale*, 353 P.2nd 782, an Idaho case, the Trial Court dismissed the Amended Complaint and the Idaho Supreme Court reversed with instructions, and stated among other things that the Motion to Dismiss has generally been viewed with *disfavor* because of the possible waste of time in case of reversal of the dismissal of the action and because the primary objective of the law is to obtain a determination of the merits of the claim; and the case cites Barron and Holtzhoff and Moore's Federal Practice to this effect. The Idaho Supreme Court cited the famous U. S. Supreme Court case in stating that,

* * * "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U. S. 41, 78 S.Ct.

99, 2 L.Ed.2d 80. It is not beyond doubt that appellant can prove no set of facts in support of his claim which would entitle him to relief."

POINT II

DIRECTORS, OFFICERS AND RESPONSIBLE AGENTS ARE LIABLE FOR A BREACH OR NEGLECT OF DUTY.

In *Hoggan vs. Hall*, 18 U.2nd 3, 414 P.2nd 89, the Trial Court rendered judgment for the plaintiff and defendants appealed, and the Supreme Court affirmed the Trial Court's finding that defendants tortiously violated their duty as officers and stockholders, and the Court, among other things, went on to state that:

"This court has been dedicated to the principle that when a corporation is in difficulty financially, a director is duty-bound to render succor, not secession, even as a parent would its child. It is the duty of a director to protect, not poach upon its parent. We are cognizant of the fact that there are thousands of directors who are unaware of the responsibilities of their positions, and do not realize that their personal interests are subordinate to that of their corporation in case of conflict."

In the case of *Sweeney vs. Happy Homes, Inc.*, 18 U.2nd 113, 417 P.2nd 126, the Supreme Court restated the rule again regarding corporate officers and the rule is:

*** "This rule applies in favor of the stockholders of a corporation as against its officers, but it does not ordinarily extend to a creditor. The latter is not entitled to intrude into the internal affairs of the corporation unless it be shown that the transaction was entered into with intent to hinder or

defraud creditors or that their interests are adversely affected by putting the corporation in a hazardous financial condition. Only when those circumstances are shown does the burden of proving good faith in the transaction shift to the corporation and its officers." * * *

In the present case, the plaintiff has alleged in its Amended Complaints the negligent actions of commission or omission by Inland's responsible directors, officers and agents and that plaintiff is entitled to go to trial and try to prove that Inland's directors, officers and agents divorced themselves from their fiduciary responsibilities and placed Inland in a bankrupt condition, and that these defendants are liable to plaintiff for the amount of the Amended Deficiency Judgment of \$12,840.48.

When the Trial Court executed Orders of Dismissal in favor of defendants, this in effect was granting these defendants a summary judgment under Rule 56 and this was error. There are issues of fact to be determined by the trier of facts against defendants and the defendants should not have been dismissed.

In American Jurisprudence Second, Vol. 19, Section 1276 states that directors are bound to use due care and be diligent in respect to management and administration of corporate affairs and in use and preservation of the corporation's property and assets; and for a breach or neglect of duty in such regard, directors and officers are liable for losses or injuries proximately resulting therefrom; and Section 1336 provides that creditors may obtain relief

against corporate officers and directors for wrongs committed by them; and officers and directors are liable for wrongs or torts where creditors suffer loss, Section 1341.

CONCLUSION

Plaintiff submits that the Orders of Dismissal should be reversed and the case remanded to the Trial Court with instructions that the case go to trial, with plaintiff trying to show that defendants were jointly or severally or each of them, by their actions of omission and commission, wilfully negligent in their fiduciary responsibilities, causing Inland's financial death and causing plaintiff to be damaged in the amount of its uncollectable Amended Deficiency Judgment against Inland in the amount of \$12,840.48; and that Judgment be entered against defendants jointly and severally and each of them in said amount, plus costs, as plaintiff is entitled to financial relief from these defendants.

Respectfully submitted,

Walker E. Anderson
Attorney for Plaintiff and
Appellant